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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 645

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, The New York, Chicago and St. Louis Railroad Company submits herewith its statement of particulars disclosing the basis upon which the Supreme Court of the United States has jurisdiction on Appeal to review the judgment of the Supreme Court of Pennsylvania entered in this cause on June 25, 1946. Petition for appeal was filed on September 24th, 1946 and is presented to the Supreme Court of Pennsylvania, to wit, on September 24, 1946.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered in this cause is conferred by Section 237 (a) of the Judicial Code, as amended (Jan. 31, 1928 c. 14, Paragraph 1, 45 Stat. 54). The opinion in this cause was handed down by the Supreme Court of Pennsylvania on May 27, 1946, wherein was upheld the validity of a State statute which had been attacked as contrary to the Fourteenth Amendment of the Constitution of the United States. Petition for reargument was filed as required by Rule 86 of the Supreme Court of Pennsylvania, in cases to be appealed to the Supreme Court of the United States, and Order denying the petition was handed down by the Supreme Court of Pennsylvania on June 25, 1946, which is final and complete judgment in this cause by the highest tribunal of the Commonwealth of Pennsylvania. *Kansas City Southern Railway Co.* v. *Road Improvement District No. 3 of Sevier County Arkansas,* 266 U. S. 379; *Miller* v. *Schoene,* 276 U. S. 272; *Citizens Bank of Michigan City* v. *Opperman,* 249 U. S. 449.

Statutes Involved

The sections of the statutes of the Commonwealth of Pennsylvania involved are quoted below. Only the constitutionality of the limitation on the exemption of mutual savings banks is attacked, the limitation and exemption being underscored.

1. Sections 17 and 18 of the Act of the Commonwealth of Pennsylvania, approved June 17, 1913, P. L. 507, as amended by the Act of the Commonwealth of Pennsylvania, approved July 13, 1923, P. L. 1085, as follows:

> "Section 17. All scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds,

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certificates, and evidences of indebtedness assumed, or on which interest shall be paid, by any and every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other State or of the United States, and doing business in this Commonwealth, and all scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid, by any county, city, borough, township, school district, or incorporated district of this Commonwealth are hereby made taxable in the year one thousand nine hundred and nineteen, and annually thereafter, for State purposes, at the rate of four mills on each dollar of the nominal value thereof: * * * *And provided, That the provisions of this act shall not apply to building and loan associations, or to savings institutions having no capital stock;* but nothing herein contained shall be construed to relieve or exempt individual depositors in savings institutions having no capital stock from any taxation to which such depositors may be subject; *and if at any time, either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their, or its securities, bonds or other evidences of indebtedness, clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it, or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to the said saving institution having no capital stock.* And provided further, That the provisions of this act shall not apply to fire companies, firemen's relief associations, life or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions, or assessments upon

members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax under this section on the mortgages, bonds, and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall be liable for the tax imposed by this section upon all securities so held by them, as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for State purposes shall be taxed or taxable for county, school or other local purposes."

"Section 18. That the tax for State purposes, imposed upon obligations of private and public corporations by section seventeen of this act, shall be collected in the same manner as the tax heretofore imposed for State purposes upon such obligations; it being the true intent and meaning of this act that the provisions of the law in force at the time of the passage of this act, relating to the collection of the State tax upon such obligations, shall remain unaffected by the present act."

2. Act of the Commonwealth of Pennsylvania, approved July 21, 1919, P. L. 1067, amending Section 4 of the Act of the Commonwealth of Pennsylvania, approved June 30, 1885, P. L. 193, as follows:

"Section 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, certificate or evidence of indebtedness, issued by said corporation to residents of this Commonwealth and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt,

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and to report on oath annually, on or before the last day of February for the calendar year next preceding, to the Auditor General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct four mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within sixty days after the date of settlement in each year; and his compensation for his services shall be five per centum on the first one thousand dollars or fractional part thereof collected, one per centum of all amounts over one thousand dollars and not over two thousand, and one-half of one percentum of all amounts over two thousand dollars; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; upon payment of said tax by a corporation, the scrip, bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same.

In the event of the neglect or refusal of the officers of any such corporation to make the report to the Auditor General, as herein provided, on or before the last day of February in each and every year, or within sixty days of the end of its fiscal year, as hereinafter provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the scrip, bonds, certificates, and evidences of indebtedness of such defaulting corporation and settle an account for taxes, penalty, and interest thereon, from which settlement there shall be no right of appeal. * * *"

3. Sections 18 and 19 of the Act of the Commonwealth of Pennsylvania, approved July 17, 1936, P. L. 51, as follows:

"Section 18. Tax on Scrip, Bonds, Et Cetera; Imposition and Rate of Tax.—All scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid by any and

every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other state or of the United States, and doing business in this Commonwealth are hereby made taxable for State purposes during the calendar year one thousand nine hundred thirty-six, on reports filed for the calendar year one thousand nine hundred thirty-five, or for the fiscal year beginning in the calendar year one thousand nine hundred thirty-five, at the rate of one mill on each dollar of the nominal value thereof, and during the calendar year one thousand nine hundred thirty-seven, on reports filed for the calendar year one thousand nine hundred thirty-six, or the fiscal year beginning in the calendar year one thousand nine hundred thirty-six, at the rate of four mills on each dollar of the nominal value thereof, which tax shall be in addition to the tax imposed for State purposes by section seventeen of the act, approved the seventeenth day of June, one thousand nine hundred and thirteen (Pamphlet Laws, five hundred seven), and its amendments or supplements; * * * Provided, That this section shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution or trust company, nor to interest bearing accounts in any bank, banking institution, savings institution or trust company: *And provided further, That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock, and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness, clear of and free from the said four mills tax herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, from paying the said four mills tax on any of the said such securities, bonds or other evidences of indebtedness, as may be held, owned by, or owing to, the said savings institution having no capital stock:* And provided further, That the provisions of this act shall not

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apply to fire companies, firemen's relief associations, life or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax, under this section, on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall be liable for the tax imposed by this section upon all securities so held by them as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for State purposes shall be taxed or taxable for county, school, or other local purposes. * * *"

Section 19 is similar in wording and effect to Section 18 of the Act of the Commonwealth of Pennsylvania, approved June 17, 1913, P. L. 507, quoted above.

The Issues and the Ruling Below

On February 14, 1941, The New York, Chicago and St. Louis Railroad Company filed with the Court of Common Pleas of Dauphin County, its appeal from the Order of the Board of Finance and Revenue denying petition for review of settlement of the Corporate Loans Tax for the year 1937 in the sum of $40,972.86 on securities issued by the Railroad Company. A number of issues not pertinent to this appeal are raised in the appeal to the Court of Common Pleas of Dauphin County. The issue related to this appeal is contained in Paragraph 5 of the Specifications of Objections

of the appeal to the Dauphin County Court, and complaints of tax settled at the rate of eight mills for one year on $795,500.00 par value of appellant's securities held by mutual savings banks without capital stock incorporated in Pennsylvania, resulting in violation of Section 1, Article IX of the Constitution of the Commonwealth of Pennsylvania requiring uniform taxation, and in arbitrarily and capriciously depriving the appellant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and impairment of contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.[1] The Corporate Loans Tax in Pennsylvania is a tax levied upon bonds and other securities and evidences of debt held by residents of Pennsylvania and issued or the payment assumed by Pennsylvania corporations and by corporations doing business in Pennsylvania. From 1891 until 1935 it was a four mill tax upon the par value of the bonds. In 1935 an Act was approved adding an additional mill, and in 1936 this Act was amended to add four mills instead of one mill, making the total tax eight mills.

The tax is assessed and collected by the Treasurer of the corporation at the time interest is paid. If no interest is paid no tax is assessed or collected. By the decision of the Supreme Court of Pennsylvania in this case the corporation is construed to be the assessor and collector of the tax and this construction is not here questioned.

By the Act of the Commonwealth of Pennsylvania, approved May 1, 1909, P. L. 198, mutual savings banks without capital stock were added to the exempt classes of holders of otherwise taxable securities and evidences of debt with the proviso: "and if at any time, either now or hereafter,

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[1] Page 11a Printed Record in Supreme Court of Pennsylvania.

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any persons, individuals or bodies corporate have agreed or shall hereafter agree to issue *his, their or its* securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by or owing to said savings institution having no capital stock."

This proviso was continued in effect in the Act of the Commonwealth of Pennsylvania of 1913, and its amendments, and in the Act of the Commonwealth of Pennsylvania of 1936 referred to above. The obvious purpose of this proviso was to continue in force the obligation of the corporation issuing the bond to pay the tax which it had agreed to pay for the taxpayer. The holder of the bonds was exempted. The issuer of the bonds continued to pay the holder's tax. "A's" tax was imposed upon "B". The debtor had to pay the creditor's tax from the payment of which the creditor had been excused.

Since however, the Corporate Loans Tax had been and still is uniformly held by the courts of Pennsylvania to be a tax upon property (*Commonwealth of Pennsylvania* v. *Lehigh Valley Railroad Company*, 104 Pa. 89; *Commonwealth* v. *Lehigh Valley Railroad Co.*, 186 Pa. 235, 246, 40 A. 491, 492; *In re Wyoming Valley Ice Co.*, 145 F. 267; *Commonwealth* v. *Jessup & Moore Paper Co.*, 31 Dauph. 273; *Commonwealth* v. *Safe Harbor Water Power Corporation*, 43 Dauph. 415) both the lower court and the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Lehigh Valley R. R. Co.*, 244 Pa. 241, 90 A. 564, did not accept the obvious purpose of the proviso. Instead they held that the tax remained upon the tax-free-covenant bonds in the hands

of mutual savings banks without capital stock in Pennsylvania, while exempting bonds in the hands of mutual savings banks without capital stock, which did not contain such covenant. Thus, the mutual savings banks without capital stock held two classes of bonds, one taxable and the other not taxable. The obligation of the corporation to pay the tax referred to in the proviso, was its obligation as collector of the tax for the Commonwealth, and not the obligation imposed by its covenant. The covenant merely tagged the bond for classification. Since the tax remained on the bond, the covenant to pay the tax was kept active.

Certain corporations in their covenants limited the amount of tax they would pay to four mills, while other corporations placed no limit on the amount of Corporate Loans Tax they would pay on behalf of the holder of the bonds. When the Act of 1936 was passed adding four mills to the four mills already imposed, the Commonwealth, under the construction placed upon the Act by the Supreme Court of Pennsylvania requiring the corporations which agreed to pay only four mills of such tax to collect the additional four mills from the mutual savings banks without capital stock, should have collected the additional tax on bonds with tax-free covenants. This the Commonwealth refused to do and limited the payment of the tax on such bonds to the four mills which the corporations had agreed to pay.[1a]

Because the appellant had a covenant to pay whatever tax might be imposed, the Court of Common Pleas of Dauphin County in the instant case sustained in full the eight mills of tax imposed on $795,500.00 of appellant's securities held by mutual savings banks without capital stock containing tax-free-covenant clauses. It dismissed the attack on the constitutional validity of the proviso imposing the tax, by the simple statement that it was in

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[1a] Page 45a Printed Record in Supreme Court of Pennsylvania.

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the power of the Commonwealth to impose the tax, citing the case of *Commonwealth* v. *School District of Pittsburgh*, 343 Pa. 394, which had upheld the authority of the earlier case of *Commonwealth* v. *Lehigh Valley R. R. Co., supra.*[2]

The appellant took an exception to this conclusion of the Court of Common Pleas of Dauphin County as follows:

> "9. The learned trial judge erred in failing to conclude that the imposition of liability upon the defendant to pay over the corporate loans tax involved in this case unconstitutionally deprived the defendant of its property without due process of law and denied to it the equal protection of the law."[3]

The appellant also took exception to the finding of the trial judge that the defendant was liable for the tax on its tax-free covenant bonds held by Pennsylvania mutual savings institutions having no capital stock. The court overruled the exceptions.[4]

The overruling of the exceptions was assigned as error in an appeal taken to the Supreme Court of Pennsylvania.[5] It sustained the judgment of the Court of Common Pleas of Dauphin County in the matter involved in this appeal as well as on other points. In the matter of the constitutional validity of continuing the tax on tax-free-covenant bonds of the appellant held by mutual savings banks without capital stock, it contented itself with referring to the two cases in which the point had already been settled—*Commonwealth* v. *Lehigh Valley R. R. Co., Supra,* and *Commonwealth* v. *Pittsburgh School District, supra.*

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[2] Page 234a Printed Record in Supreme Court of Pennsylvania.

[3] Page 242a Printed Record in Supreme Court of Pennsylvania.

[4] Page 244a Printed Record in Supreme Court of Pennsylvania.

[5] Pages 13 and 15 Printed Brief for Appellant in Supreme Court of Pennsylvania.

It is the contention of The New York, Chicago and St. Louis Railroad Company that:

1. The continuing in force of the obligation of the appellant below under the tax-free covenant clauses in bonds held by mutual savings banks without capital stock compels appellant below to pay a tax on property not owned by it but owned and held by mutual savings banks without capital stock, thereby depriving appellant below of its property without due process of law and denying to it the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The construction of the proviso of the taxing statute by the Supreme Court of Pennsylvania whereby bonds, securities and other evidences of debt held by mutual savings banks without capital stock are placed in two classes—those containing no tax-free-covenant clauses and those containing tax-free covenant clauses—is arbitrary and capricious classification in that while non-tax-free-covenant bonds in the hands of mutual savings banks without capital stock are exempt from tax, tax-free-covenant bonds continue to be subject to the tax solely for the purpose of keeping active for the benefit of the Commonwealth, a covenant which existed only for the benefit of the holder of the bonds. The appellant below is thereby denied the equal protection of the law and deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The Questions Are Substantial

The questions submitted in this appeal are substantial and important. Aside from the amount of tax at stake, which is considerable, there is the principle involved of whether or not a state may arbitrarily use the power of

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classification of property solely for the purpose of nullifying a right under the Federal Constitution.

In this case the Legislature of Pennsylvania exempted from the corporate loans tax of that state corporate bonds held by mutual savings banks without capital stock located in the state. Quite a number of classes of holders of bonds exempt from the tax had been established, and no exception is taken to classifying these banks for purposes of tax exemption. They are founded to enable people of few means to secure a better return on their savings than is elsewhere available while retaining all the usual safeguards. They have many cooperative features. They are an object of special regard of the state.

The objection of the appellant comes when the state taxes corporate bonds with tax-free-covenant clauses in the hands of these tax exempt mutual savings banks without capital stock and imposes the tax on the issuer of the bonds. The covenant of the issuing corporation had become dormant. To compel the covenantor now to pay the tax was compelling it to do more than it had agreed to do.

On its face, this imposes a property tax on property not owned. The property, corporate bonds, are owned by the mutual savings banks. The tax is paid by the issuing corporation, a party who has no title to the bonds. The Legislature apparently had seized upon the fact that the obligor of the bonds had some relationship to them and thereby attempted to impose the tax upon it. But the obligor has no property interest in its own obligations. The obligee owns the obligations. The dangerous doctrine is established that the State may impose upon the debtor a tax properly due and owing by the creditor, but no similar attempt has been made by any other state or by the Federal Government so far as can be found.

It has been settled that the State cannot tax "B" for the property owned by "A" *Schlessinger* v. *State of Wisconsin*, 270 U. S. 230; *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Heiner* v. *Donnan*, 285 U. S. 312.

The dissent in the cases just cited did not in any way attempt to deny the rule that the State could not collect taxes against "B" on property owned by "A". That proposition has never been doubted.

The Pennsylvania Supreme Court has tried to get around this unconstitutional taking of property, by construing the taxing Act to set up two classes of bonds in the portfolios of the mutual savings banks without capital stock, those without tax-free covenants being exempt and those with tax-free covenants being subject to the tax. Mark you, the tax-free-covenant bonds are taxed in the hands of and as the property of the mutual savings banks under this construction. This keeps alive the covenant of the issuer of the bonds in the eyes of the Pennsylvania courts. The issuer being bound, must pay the tax. Thus is avoided the embarrassment of saying that "B" is being taxed for property of "A". A borrower, foolishly or otherwise, in order to secure funds, promises the lender to pay any taxes that are levied on the obligation. The state exempts the lender from paying tax, except tax on obligations which the debtor has agreed to pay. Such obligations in his hands are classified by the agreement to pay the tax in order to keep alive the agreement to pay the tax.

It is insisted that "B" is still being taxed for property of "A", despite the construction of the Supreme Court of Pennsylvania. While the Supreme Court of the United States considers itself concluded by the ordinary construction of a statute by the state court of last resort, in a question of whether a tax statute deprives a party of rights secured by the Federal Constitution, it does not look to the

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form in which the taxing scheme is cast nor to the characterization of that scheme as adopted by the state court. The operation and effect of the tax, the substance and not the form is considered. *St. Louis Southwestern Railway Company* v. *Arkansas ex rel Norwood,* 235 U. S. 350, 362, 363; *Senior* v. *Braden,* 295 U. S. 422, 429; *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania,* 296 U. S. 113, 119.

When the Commonwealth of Pennsylvania raised the corporate loans tax from four mills to eight mills it did not, in the case of an issuer of bonds who had agreed to pay only four mills of tax for the holder, collect the additional four mills from the mutual savings bank without capital stock which held the bonds. This it should have done under the ruling of the Pennsylvania courts. It disregarded the ruling and contented itself with collecting only four mills from the issuer of the bonds, itself.

It is respectfully submitted that real and substantial questions are presented in this case.

ROBERT M. FISHER,
JOHN Y. SCOTT,
Counsel for The New York, Chicago. and St. Louis Railroad Company.

This 24th day of September, 1946.

APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 13 and 14 May Term, 1946

COMMONWEALTH OF PENNSYLVANIA

v.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, *Appellant*

Appeals from the Orders of the Court of Common Pleas of Dauphin County at No. 200 Commonwealth Docket, 1941 and No. 92 Commonwealth Docket, 1944

OPINION OF THE COURT—Filed May 27, 1946

HORACE STERN, *J.:*

The questions involved in these cases have been considered at length in *Appeal of Fidelity-Philadelphia Trust Company*, 354 Pa. 358, 47 A. 2d 272. The New York, Chicago & St. Louis Railroad Company appeals from assessments of the corporate loans tax imposed upon it for the years 1937 and 1941. This company is the offspring of three successive consolidations: The first between the New York, Chicago and St. Louis Railroad Company (a New York corporation) and a Pennsylvania corporation, the second between the consolidated New York, Chicago & St. Louis Railroad Company, an Ohio corporation and an Indiana corporation; the third between the twice previously consolidated New York, Chicago & St. Louis Railroad Company, two Illinois and two Indiana corporations. Some of the bonds here in question were issued by the present corporation, others by either the first or the second consolidated company. The corporation does not have any fiscal officer resident within this Commonwealth and the interest on the bonds is paid from an office outside the State.

For the reasons stated in the *Fidelity-Philadelphia Trust Company* case we are of opinion that appellant is to be

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regarded as a domestic corporation and that therefore its liability for the corporate loans tax is not affected by the fact that it does not have a treasurer resident within the Commonwealth.

Some of appellant's bonds are held by Pennsylvania savings institutions having no capital stock, but they contain covenants that the interest will be paid without any deduction for taxes. The Act of May 10, 1937, P. L. 633, section 3, while providing that the personal property tax is not applicable to such savings institutions, further provides that if a corporation has agreed to issue its bonds free from the tax it is not relieved from paying the tax on its bonds held or owned by such an institution—a provision which harks back to the Act of May 1, 1909, P. L. 296. Appellant contends that this constitutes an unconstitutional discrimination between bonds containing and those not containing a tax-free covenant, but provisions of this type were considered and upheld in *Commonwealth* v. *Lehigh Valley R. R. Co.*, 244 Pa. 241, 90 A. 564, and *Commonwealth* v. *Pittsburgh School District*, 343 Pa. 394, 23 A. 2d 496.

Judgment affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

Appeal No. 32, reported at page 241 of Volume 244 of the Pennsylvania State Reports

COMMONWEALTH

v.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*

Appeal from tax settlement. Tried by the court without a jury. Kunkel, P. J., filed the following opinion:

This is an appeal from the settlement of an account against the defendant company for tax on its loans for the year 1910. The case has been submitted to the court to be

tried without a jury agreeably to the provisions of the Act of April 22, 1874, P. L. 109. There being no dispute respecting the facts, we find them to be as set forth in the defendant's requests for findings of fact filed herewith. Summarized they are as follows:

Facts

On July 25, 1911, the account appealed from was settled against the defendant company for tax on its loans for the year 1910, in which account it was charged with a tax on $53,617,000 of indebtedness. The tax, after the allowance of commissions, amounted to $204,957.81, of which amount the defendant paid $180,000 and took this appeal from the balance of the account. The $53,617,000 of indebtedness taxed included bonds and notes held by savings institutions of this State having no capital stock to the amount of $4,598,000. These securities contained an agreement on the part of the defendant company that the interest thereon should be paid without deduction for any tax of any state, which the defendant company might be required to pay or to retain therefrom under present or future laws, and some of the securities contained an agreement in so many words that the defendant would pay the tax. The defendant contends that the indebtedness owned and held by savings institutions of this State having no capital stock is not subject to tax by virtue of the exemption contained in Proviso 2 of the Act of May 1, 1909, P. L. 298.

Discussion

The questions presented by this appeal relate to the validity and construction of Provisos 2 and 4 of the Act of May 1, 1909, P. L. 298. The act itself is an amendment of the tax legislation contained in the Act of June 1, 1889, P. L. 420, as amended by the Act of June 8, 1891, P. L. 229, and purports to relieve and exempt savings institutions having no capital stock from the loans tax therein provided. It is a reenactment of the first section of the Act of June 8, 1891, and imposes an annual tax of four mills on corporate bonds or securities held, owned or possessed by corporations of this State or any other State, but de-

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clares by Proviso 2, "That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock"; and by Proviso 4, "That if at any time, either now or hereafter, any persons, individuals or bodies corporate, have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidence of indebtedness as may be held, owned by or owing to the said saving institution having no capital stock." It is manifest that the two provisos must be construed together; for Proviso 4 directs that "nothing herein contained shall be so construed as to relieve or exempt * * * from paying the said four mills tax," etc. It thus expressly refers to Proviso 2, which grants the exemption, and plainly places a limitation on its construction and scope.

To understand the legislative intention expressed by the provisos, they must be construed in the light of the law as it stood at the time they were enacted. At that time corporate securities held and owned by savings institutions having no capital stock were taxable annually at the rate of four mills, and such tax was required to be collected by the corporation issuing the securities. The Act of June 30, 1885, P. L. 193, imposed upon the corporation the duty to deduct the tax from the interest on its indebtedness when it paid the same and to return and pay the tax into the State treasury. If it wilfully failed or neglected to perform the duty, it itself became liable for the tax: Com. *v.* Del. Div. Canal Co., 123 Pa. 594; Com. *v.* Lehigh Valley R. R. Co., 129 Pa. 429; Com. *v.* Philadelphia & Reading R. R. Co., 150 Pa. 312; Com. *v.* Lehigh Valley R. R. Co., 185 Pa. 235. Proviso 2 of the Act of May 1, 1909, relieves and exempts savings institutions having no capital stock from the tax, but in Proviso 4 the legislature recognizes the fact that such savings institutions may hold or own corporate securities containing an agreement on the part of the corporation

issuing them to pay the tax, and therefore it provides that in such case the corporation shall not be exempt from the duty of returning and paying the tax as theretofore required by law. The relief or exemption which Proviso 2 was intended to afford was for the benefit of the savings institutions and not for the benefit of the corporation issuing the securities. Legislative relief or exemption was intended to be afforded where such relief or exemption was necessary, and not where, because the debtor corporation had assumed the payment of the tax or had issued its securities clear of or free from the tax, no relief was needed. It is quite clear to us, that although Proviso 4 is awkwardly constructed, it intended to preserve the tax on corporate securities owned or held by savings institutions which had no capital stock, where in and by the securities themselves the institutions were already relieved, and needed no legislative exemption. The legislative intention to retain the tax is apparent, although it has been expressed by an indirect rather than by a direct declaration to that effect.

The contention of the defendant company that a tax is imposed by Proviso 4 on the corporation issuing the securities is untenable. The proviso does not impose any tax on corporate securities, but directs that the corporation shall not be relieved or exempt from paying the tax which it theretofore was required to deduct from the interest paid on its securities. The effect of the language used is to continue the tax on such securities, even though owned and held by savings institutions having no capital stock. Proviso 4, as we have said, appears to be an indirect way of declaring that the tax shall remain on the securities so held. A reference to the Act of June 30, 1885, P. L. 193, will show that Proviso 4, when it declares that "nothing herein contained shall be so construed as to relieve or exempt" the corporation issuing the securities "from paying" the four mills tax on the securities held, owned by or owing to the savings institution having no capital stock, is but a recognition of the former's requirements with respect to paying, which are as follows: "It shall be his further duty (the duty of the treasurer of the corporation issuing the securities) to deduct three

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mills (now four mills; Act of June 8, 1891, P. L. 229; Com. *v.* Wilkes-Barre and Scranton Ry. Co., 162 Pa. 614), on every dollar of the interest paid as aforesaid and return the same into the state treasury," and again "for every failure to assess and pay said tax," and further "on payment of said tax." It thus clearly appears that the tax which the corporation is not to be relieved of by Proviso 4 from paying is the tax which it is its duty to collect and pay under the Act of 1885. The proviso declares it shall not be relieved of that duty, and if not relieved, it must be because the tax on the securities issued free and clear of tax is retained. The result of the views thus expressed is to obey the mandate in the proviso as to the construction of the Act, and to relieve from the tax only such corporate securities owned by savings institutions having no capital stock as have been issued without any stipulation for the payment of the tax by the debtor corporations.

What we have said we think disposes of the defendant's contention that Proviso 4 is void, because no notice thereof is given in the title. If the interpretation we have adopted is the correct one, the title is wider in scope than the provisos. It purports to relieve and exempt wholly from the provisions of the act savings institutions having no capital stock, whereas the construction we have placed on Proviso 4 restricts the exemption in Proviso 2 to such corporate securities owned and held by them as have not been issued free and clear of the tax.

It also disposes of the defendant's objection that Proviso 4 attempts to enforce the contract between it and the owners of its securities. The liability of the defendant for the tax does not arise out of the contract, but out of the legislation which imposes the tax and which requires the defendant to collect and pay. The exemption from the tax is modified by the proviso as respects the one kind of securities; as to the other kind only, the exemption remains. The language of the proviso is descriptive merely of the kind which shall not receive the exemption.

The constitutionality of Proviso 2 seems to be conceded; and it is not disputed that there is a recognized difference between corporate securities relieved by agree-

ment of the parties from tax and those in which there is no agreement for relief.

The classification is not an arbitrary one, but one which actually exists in the business world. If the power exists to relieve savings institutions as a class from the tax on all their corporate securities, we cannot see how it may not be exercised so as to relieve them from the tax on some of their corporate securities, all members of the class being treated alike.

It appears in the case before us that the indebtedness on which the tax is sought to be recovered was issued by the defendant company free and clear of tax, it being provided in and by the securities that the interest should be paid without deduction for State tax. This stipulation in its usual and popular sense means that the securities should be free of tax so far as the holders or owners thereof were concerned. In four classes of obligations the defendant agreed to pay the State tax to which its securities were or might be subjected. Among the owners of the securities, to the amount of $4,598,000, were several savings institutions of this State having no capital stock. The tax on this latter amount the defendant failed to deduct from the interest which it paid thereon for the year for which this settlement was made.

Conclusions of Law

Applying the views we have expressed as to the construction and validity of the provisos to the Act of May 1, 1909, we conclude:

1. That the indebtedness of $4,598,000, issued free and clear of tax and owned by savings institutions having no capital stock, is subject to the loans tax and is not relieved or exempted therefrom by Proviso 2 of the Act of May 1, 1909.

2. That the defendant company, having failed to deduct the tax thereon when it paid the interest, is liable therefor.

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3. That the Commonwealth is entitled to recover as follows:

Indebtedness		$53,617,000.00
Tax, less commission,	$	204,957.81
Less tax on bonds held by Harrisburg Trust Company and Mauch Chunk Heat, Power and Electric Company, $26,000		104.00
	$	204,853.81
Less amount paid,		180,000.00
	$	24,853.81
Interest from Sept. 25, 1911		2,363.15
Attorney General's commission		1,360.84
Total amount due	$	28,577.80

Accordingly we direct judgment to be entered in favor of the Commonwealth and against the defendant for the sum of $28,577.80, unless exceptions be filed within the time limited by law.

Errors assigned were in dismissing exceptions to the opinion of the court.

A. C. Stamm, with him *John G. Johnson*, for appellant.

William M. Hargest, Second Deputy Attorney General, with him *John C. Bell, Attorney General*, for appellee.

Per Curiam, February 16, 1914:

The judgment is affirmed on the opinion of the learned president judge of the Common Pleas.

APPENDIX "C"

COMMONWEALTH

v.

PITTSBURGH SCHOOL DISTRICT, *Appellant*

Supreme Court of Pennsylvania, January 5, 1942: Reported at 343 Pa. 394, 23 A2d 496.

The question presented on this appeal by the School District of the City of Pittsburgh is whether it is liable for the four mill State tax on bonds which it has issued, containing a tax free covenant, held by (1) savings institutions having no capital stock and (2) by resident corporate trustees under trusts for non-resident beneficiaries. The court below held the School District liable for the tax.

The statute imposing the tax is the Act of June 17, 1913, P. L. 507, as amended. Section 17, 72 PS §2121, provides:

"* * * all bonds * * * on which interest shall be paid, by any * * * school district * * * are hereby made taxable * * * annually * * * for State purposes at the rate of four mills on each dollar of nominal value thereof * * * the provisions of this act shall not apply to * * * savings institutions having no capital stock * * * and if at any time * * * any * * * bodies corporate have agreed or shall hereafter agree to issue * * * bonds * * * clear of and free from the said four mills tax * * * or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt * * * it * * * from paying the said four mills tax on any of said * * * bonds * * * as may be held, owned by, or owing to the said savings institution having no capital stock."

It is argued in behalf of the School District that it does not come within the designation, "bodies corporate," appearing in the act, who are required to pay the tax, even though the bonds are held by savings institutions in instances where the bonds are issued with tax free covenants. We are unable to accept the argument, because in our opinion

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school districts are "bodies corporate" and have been so recognized by express legislative provisions.

Article I, section 101, of the School Code (Act of May 18, 1911, P. L. 309, as amended, 24 PS §21 et seq.) makes each city a separate school district. Section 123, 24 PS §34, confers upon each district the right to sue and be sued "in its corporate name." Section 124, 24 PS §35, gives the power to the school directors to adopt a "corporate seal." And Section 119, 24 PS §30, is in this convincing language: "The several school districts in this Commonwealth, established by this act, shall be and hereby are vested, *as bodies corporate* with all necessary powers to enable them to carry out the provisions of this act." The lawmaking body having in explicit terms declared them to be "bodies corporate," we must and do so recognize them. Furthermore, as long ago as 1862, in *Wharton* v. *School Directors of Cass Township*, 42 Pa. 358, 363, we said: "They belong to that class of quasi corporations to which counties and townships belong," and in *Erie School District* v. *Fuess*, 98 Pa. 600, 606, we said, they "are corporations of lower grade and less power than a city." See also *Mulligan* v. *School District*, 241 Pa. 204, 88 A. 362. Recently, in *Wilson* v. *Phila. School Dist.*, 328 Pa. 225, 249, 195 A. 90, we spoke of the power of the School District "to borrow money for its proper corporate purposes." *Com.* v. *Beamish*, 81 Pa. 389, is not authority against our present conclusion. We were there dealing with a penal statute which required strict construction. We remarked, however, that legislation has conferred on school district certain capacities as "bodies corporate."

As to the bonds held by the resident trustee in trust for non-resident beneficiaries, it is sufficient to say that under all our decisions property held in trust is assessable to the trustee where the trust is administered. The payment of taxes on trust property is an obligation of the trustee: *Guthrie* v. *Pittsburgh, Cincinnati & St. Louis Ry.*, 158 Pa. 433, 27 A. 1052; *Cumberland Co.* v. *Lemoyne Trust Co.*, 318 Pa. 85, 178 A. 32; *Dorrance's Est.*, 333 Pa. 162, 3 A. 2d 682; *Griscom's Est.*, 333 Pa. 186, 3 A. 2d 693.

It is suggested in appellant's brief that if we reach the conclusion which we have, that the taxes are payable by the

School District, the act warranting the levy must be considered discriminatory and in violation of the constitutional provision against unreasonable classification, citing *Com.* v. *Quaker City Cab Co.*, 287 Pa. 161, 134 A. 404; *Com.* v. *Girard Life Ins. Co.*, 305 Pa. 558, 158 A. 262. We think neither of these cases supports the contention and that there is no arbitrary classification made. In *Com.* v. *Hudson Coal Co.*, 287 Pa. 64, 134 A. 413, we said that the matter of classification is one for the Legislature and not for the courts and that it is not for us to interfere, unless we can say that the grouping made by that body is purely illusory and clearly intended as an evasion of the Constitution. The same idea, in other language, is expressed in the *Girard Life Ins. Co.* case and in *Com.* v. *Delaware Division Canal Co.*, 123 Pa. 594, 16 A. 584; *Com.* v. *Germania Brewing Co.*, 145 Pa. 83, 86, 22 A. 240, and in the *Quaker City Cab Co.* case.

The judgment of the court below is affirmed.

APPENDIX "D"

Appeal of FIDELITY-PHILADELPHIA TRUST CO.

Supreme Court of Pennsylvania, May 27, 1946

Reported at 354 Pa. 355, 47 A. 2d 267

HORACE STERN, *Justice:*

The question is: Are the bonds issued by a foreign railroad corporation which thereafter became a component part of an interstate consolidated railroad company pursuant to a consolidation agreement filed in Pennsylvania and in other states, subject to the state personal property tax in the hands of residents of Pennsylvania, if the consolidated company assumed the obligation to pay the interest on such bonds but its treasurer is not a resident of this State?

The appeal in the court below was from the assessment of such a tax for the year 1939 imposed upon the Fidelity-Philadelphia Trust Company as trustee, guardian or execu-

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tor for sundry trusts, wards or estates holding bonds of the Western Maryland Railroad Company, the New York Central Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Delaware, Lackawanna & Western Railroad Company. The first three of these railroads are companies created, as far as Pennsylvania is concerned, by a consolidation under the act of March 24, 1865, P. L. 49, 67 P. S. § 599 et seq., and each of them assumed liability on bonds which had been issued by a component company incorporated under the laws of a state other than Pennsylvania. None of the four has a treasurer who maintains his office in this Commonwealth, nor is the interest on their bonds paid from any office in this State. The court sustained the appeal and struck off the assessment; from that action the Commonwealth now appeals to this court. The City of Philadelphia, the County of Allegheny, the Western Maryland Railroad Company, and several trust companies in Philadelphia, have filed briefs as amici curiae.

Our first inquiry must be directed to the domiciliary status of a company formed by the consolidation of railroad companies incorporated under the laws of Pennsylvania and of other states. The Act of March 24, 1865, P. L. 49, section 3, provides that upon such consolidation the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this Commonwealth all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties, of each of the corporations so consolidated. Many perplexing questions have arisen as to the legal nature of such a consolidated corporation and its status in each of the states where one of its component parts had been incorporated; the views taken by the various jurisdictions in regard to such problems are far from harmonious. The prevailing doctrine, however, is that a corporation organized by consolidation of corporations incorporated under the laws of several states is to be viewed as a domestic corporation in each of the states which authorized its existence and is subject to the laws of such state so far as its powers and liabilities therein are concerned. See cases cited in 51 C. J. 784, 785, § 566, notes 4

and 5; in 44 Am. Jur. 548, § 324, note 15; and in Fletcher, Cyc. Corp., Vol. 15, p| 292, ch. 61, § 7189, note 66.

The present assessment of tax on the Fidelity-Philadelphia Trust Company, as fiduciary, was made in pursuance of the Act of June 22, 1935, P. L. 414, as reenacted and amended by the Act of May 18, 1937, P. L. 633, 72 P. S. § 3242 et seq. By section 3 of the latter act all personal property of the classes therein enumerated, including all loans issued by any corporation created under the laws of this Commonwealth or of any other state, owned, held or possessed by any resident, except such loans as are made taxable for state purposes by section 17 of the act, are made taxable, annually, for state purposes, at the rate of four mills on each dollar of the value thereof. By section 17 all bonds issued, assumed or on which interest is paid by any corporation incorporated under the laws of this Commonwealth, or the laws of any other state and doing business in this Commonwealth and having a resident corporate treasurer therein, are made taxable for state purposes at the rate of eight mills on each dollar of the nominal value thereof. The act thus maintained the differentiation, established by the Act of June 17, 1913, P. L. 507, 72 P. S. § 4821 et seq., between the personal property tax and the corporate loans tax; the former is payable by the holder of the bond, annually, and is based upon the value of the bond, whereas the latter is retained by the corporation when making payments of interest on the bond and is based upon its face amount or nominal value. Neither is imposed upon the corporate obligor but both upon the holder of the bond, the corporation being merely the collector of the tax on the corporate loan: Commonwealth *v.* Lehigh Valley R. R. Co., 104 Pa. 89, 99; Commonwealth *v.* Lehigh Valley R. Co., 186 Pa. 235, 246, 40 A. 491, 492; Commonwealth ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 102, 143 A. 495, 496, 60 A. L. R. 737. The personal property tax and the corporate loans tax are mutually exclusive; if the bond is one on which a corporate loans tax must be deducted from the interest and paid by the corpora-

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tion the holder of the bond need not pay thereon any personal property tax; if, on the other hand, the bond is one on which the corporation is not required to collect and pay the corporate loans tax it is subject to the personal property tax in the hands of the owner: In re Alison's Estate, 338 Pa. 194, 12 A. 2d 920. The Act of 1937 thus provides in effect for two classes of corporate obligations—those subject in the hands of the owners to the state personal property tax, consisting of such corporate loans as are not made taxable for state purposes under section 17, and those subject to the corporate loans tax, consisting of (1) bonds of domestic corporations and (2) bonds of foreign corporations doing business in this Commonwealth and having a resident corporate treasurer therein. When the history of this tax legislation is studied the scheme which it establishes is readily comprehended. It aims to have a tax collected on every bond owned, held or possessed by a resident of Pennsylvania, but the obligation to accomplish that collection is placed, whenever constitutionally permissible, upon the corporation itself, for obviously it is more desirable to collect the tax in a lump sum from the corporation issuing the bonds or assuming payment of the interest thereon than from a multitude of individual and frequently unknown owners. The Supreme Court of the United States decided, however, in New York, Lake Erie and Western R. R. Co. *v.* Pennsylvania, 153 U. S. 628, 14 S. Ct. 952, 38 L. Ed. 846, and Delaware & Hudson Canal Co. *v.* Pennsylvania, 156 U. S. 200, 15 S. Ct. 358, 39 L. Ed. 396, that Pennsylvania could not impose the duty of assessing and collecting a tax on bonds held by residents of Pennsylvania upon foreign corporations making payments of interest from an office maintained in another state; it was held that Pennsylvania has no jurisdiction over a foreign corporation, even if doing business in this Commonwealth, so far as its activities in another state are concerned. Although this ruling was recognized as controlling and was therefore followed by this court in Commonwealth *v.* Barrett Manufacturing Co., 246 Pa. 301, 92 A. 302, it may be said parenthetically that

those decisions of the United States Supreme Court have been greatly weakened, if not wholly overridden, by subsequent cases in that court, notably Travis *v.* Yale & Towne Manufacturing Co., 252 U. S. 60, 40 S. Ct., 228, 64 L. Ed. 460; Monamotor Oil Co. *v.* Johnson, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; Felt & Tarrant Manufacturing Co. *v.* Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; McGoldrick *v.* Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Nelson *v.* Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, 132 A. L. R. 475; and International Harvester Co. *v.* Wisconsin Department of Taxation, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373; in each of those cases statutes were upheld under which a duty of collecting taxes would fall upon non-resident officials of foreign corporations. However, the Pennsylvania legislature, apparently with the earlier cases in mind chose to provide in section 17 of the Act of 1937 that the corporate loans tax, while applicable to all domestic corporations, should be applicable only to such foreign corporations as had a treasurer resident in this State.

The present controversy involves bonds issued or assumed by domestic corporations whose treasurer- are not resident in Pennsylvania. The question arises by reason of the fact that while, as just stated, section 17 of the Act of 1937 imposes the corporate loans tax upon all domestic corporations, section 18 provides that it shall be the duty of the *resident* treasurer of each corporation incorporated under the laws of this Commonwealth or the laws of any other state, and doing business in this Commonwealth, to assess the corporate loans tax imposed for state purposes by section 17 of the act and to deduct the tax imposed by that section on the payment of any interest and return it to the State Treasury. It is the contention of the railroad corporations, therefore, that the duty in regard to the collection of the corporate loans tax is thus imposed only upon treasurers resident in Pennsylvania, that, as they have no such resident treasurer, there is no obligation on their part to deduct and pay the corporate loans tax, and that consequently their bonds, although apparently embraced in the class enumerated in section 17, must be

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relegated to section 3 as subject to the personal property tax in the hands of the individual owners. While it must be admitted that that contention would gain support if the phraseology of section 18 were to be given a wholly literal interpretation, its persuasive force fails when resort is had to an analysis of the successive tax statutes and the construction placed upon them by this court, for it then clearly appears that the use of the word "resident" in section 18 was not intended to transfer the bonds of domestic corporations whose fiscal officers happen to exercise their functions in states other than Pennsylvania from the class which, under section 17, are subject to the corporate loans tax to the class which, under section 3, are subject to the personal property tax. That Pennsylvania has the constitutional *right* to impose on non-resident treasurers the duty of deducting the tax due by residents of Pennsylvania would seem to be beyond question, for to say that a domestic corporation, existing as it does only by the authority given it by the State, can, by the simple expedient of having its treasurer maintain his office outside the State, escape what is essentially nothing more than an administrative duty imposed upon it by the laws of the State, would be to propound an obviously untenable proposition. Even if, therefore, the New York, Lake Erie & Western R. R. Co., Delaware & Hudson Canal Co., and Barrett Manufacturing Co. cases are still to be recognized as authorities in regard to the power of Pennsylvania over *foreign* corporations maintaining offices outside the State, there can be no question but that the duty imposed by the Act of 1937 upon treasurers to deduct the corporate loans tax may be made applicable to the treasurers of *domestic* corporations whether resident within or without the State. Nor is there any doubt but that the legislature has consistently shown its intention of exercising such power, for the legislation all indicates that the corporate loans tax is to have the broadest possible scope, and that, wherever it can legally be imposed, it is to be given preference to the personal property tax. The Act of 1937, section 17, like the Act of July 15, 1919, P. L. 955, 72 P. S. 2121, expressly provides that only such bonds as cannot be made subject to the corporate loans tax under that section shall

be taxed under the personal property tax imposed by section 3. See In re Alison's Estate, 338 Pa. 194, 196, 197, 12 A. 2d 920, 921, 922.

It is to be borne in mind that the duty of collecting the corporate loans tax is not placed by the statutes upon the treasurer in his individual but only in his official capacity as an officer of the corporation. Commonwealth ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 106, 143 A. 495, 497, 60 A. L. R. 737. It is upon the corporate entity that the obligation rests, and the reference to a treasurer in the Act of 1937, as in the various preceding acts, is merely incidental and directory. In the Act of April 30, 1864, P. L. 218, section 3, the duty of retaining the tax upon payment of the interest was imposed upon "every president, treasurer, cashier, or other officer" of the corporation. In the Acts of June 7, 1879, P. L. 112, section 17, and June 10, 1881, P. L. 99, section 2, that duty was placed upon the *corporation*. By the Act of June 30, 1885, P. L. 193, section 4, 72 P. S. 2162, the treasurer was given the duty of assessing and deducting the tax upon payment of interest on the bonds. The Act of June 1, 1889, P. L. 420, section 2, speaks of the corporate loans tax required to be paid into the state treasury by the *corporation*. In the Act of July 15, 1919, P. L. 954, 72 P. S. §§ 2142, 2143, the duty to deduct the tax from interest due and payable for prior years was to be that of the treasurer or *other* fiscal officer of the corporation. While the Act of July 21, 1919, P. L. 1067, 72 P. S. § 2162, provided that it should be the duty of the *treasurer* of the corporation to assess and deduct the tax, it further stated that "in the event of the neglect or refusal of the *officers* of any such corporation" to report the amount of the corporate indebtedness owned by residents of this Commonwealth it should be the duty of the Auditor General and State Treasurer to estimate a valuation of the indebtedness of "such defaulting *corporation*" and to settle an account for taxes thereon. In the Act of May 18, 1937, P. L. 633, section 18, for the first time the qualifying adjective "resident" was applied to the word "treasurer," but it is significant that when, in that same session of the legislature, section 708 of the Fiscal Code of April 9, 1929, P. L. 343, was amended by the Act of

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February 2, 1937, P. L. 3, 72 P. S. § 708, it imposed the duty of collection of the tax upon the treasurer of the corporation without providing any limitation as to his residence. It is important also to note that section 17 of the Act of 1937 speaks of the *corporation*, under certain prescribed conditions, being relieved of the duty of deducting and paying the tax for a certain part of the year; this provision followed a similar one in the Act of July 13, 1923, P. L. 1085, 72 P. S. § 2121. Thus from the general purport of all this legislation, it is clear that it was the *corporation* which was regarded as the agent obligated to report to the Commonwealth its bonded indebtedness and to deduct the corporate loans tax in making payments of interest thereon, and that the provision as to the particular officer who should attend to the duty thus imposed was merely casual and not intended to absolve the corporation whose bonds were subject to the corporate loans tax from the duty of withholding the interest and paying it into the treasury of the State. This is borne out, too, by an extremely long line of judicial decisions, for it has been uniformly held that where the particular designated official fails to perform the prescribed duty the corporation must perform it by one of its other officers or agents acting on its behalf: Commonwealth *v.* Delaware Division Canal Co., 123 Pa. 594, 618, 16 A. 584, 587, 2 L. R. A. 798; Commonwealth *v.* Lehigh Valley R. Co., 129 Pa. 429, 449, 450, 18 A. 406, 408, 410; Commonwealth *v.* Philadelphia & Reading Coal & Iron Co. 137 Pa. 481, 493, 20 A. 531, 580; Commonwealth *v.* Pennsylvania Salt Manufacturing Co., 145 Pa. 53, 55, 22 A. 215, 216; Commonwealth *v.* Delaware & Hudson Canal Co., 150 Pa. 245, 248, 249, 24 A. 599, 601; Commonwealth *v.* Wilkes-Barre & Scranton Rwy. Co. 162 Pa. 614, 621, 623, 29 A. 696, 698, 699; Commonwealth *v.* People's Passenger Rwy. Co., 183 Pa. 353, 354, 38 A. 1091, 1092; Commonwealth *v.* Lehigh Valley R. Co., 186 Pa. 235, 239, 240, 40 A. 491, 492; Commonwealth *v.* Lehigh Valley R. Co., 244 Pa. 241, 244, 90 A. 564, 565; Commonwealth *v.* Roxford Knitting Co., 268 Pa. 266, 268, 110 A. 720, 721; Commonwealth *v.* Lehigh & New England R. Co. 268 Pa. 271, 274, 110 A. 725; Commonwealth, ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 102, 143 A. 495, 496, 60 A. L. R. 737; Com-

monwealth *v.* City of Harrisburg, 335 Pa. 202, 206, 6 A. 2d 863, 865.

Because of the views thus expressed it becomes unnecessary to determine whether the court below was right in speculating that the use of the word "resident" as applied to "treasurer" in section 18 of the Act of 1937 was a mere inadvertence on the part of the legislature or was used because of a natural assumption that domestic corporations would always have some office in the State where their fiscal functions would be performed. What is perfectly clear is this—that, under section 17 of the act, the bonds of a foreign corporation whose treasurer is a non-resident are not subject to the corporate loans tax but the bonds of all domestic corporations are so subject. It is further clear that in section 18, which provides for the collection of the tax and designates the "resident treasurer" of the corporation as the official to perform that duty, such designation is merely incidental and directory, and if, as here, the bonds are, under section 17, of the class subject to the corporate loans tax, it is ultimately the obligation of the corporation issuing them, or having assumed liability thereon, to retain the tax from the interest and pay it into the treasury of the State. Therefore, if the treasurer fails in that duty, or if there is no resident treasurer to perform it, the duty still remains as far as the corporation is concerned and the corporation must perform it through some other agent or official whether resident or non-resident. The result is that the bonds here in question are not subject under section 3 of the Act of 1937 to the state personal property tax in the hands of the Fidelity-Philadelphia Trust Co., fiduciary, as owner, holder, or possessor.

Decree affirmed; costs to be paid by appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 646

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, The New York, Chicago and St. Louis Railroad Company submits herewith its statement of particulars disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Pennsylvania entered in this cause on June 25, 1946. Petition for appeal was filed on September 24, 1946, and is presented to the Supreme Court of Pennsylvania, to wit, on September 24, 1946.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered in this cause is conferred by Section 237 (a) of the Judicial Code, as amended (Jan. 31, 1928, c. 14, Paragraph 1, 45

Stat. 54). The opinion in this cause was handed down by the Supreme Court of Pennsylvania on May 27, 1946, wherein was upheld the validity of a State statute which had been attacked as contrary to the Fourteenth Amendment of the Constitution of the United States. Petition for reargument was filed as required by Rule 86 of the Supreme Court of Pennsylvania, in cases to be appealed to the Supreme Court of the United States, and Order denying the petition was handed down by the Supreme Court of Pennsylvania on June 25, 1946, which is final and complete judgment in this cause by the highest tribunal of the Commonwealth of Pennsylvania. *Kansas City Southern Railway Co.* v. *Road Improvement District No. 3 of Sevier County, Arkansas,* 266 U. S. 379; *Miller* v. *Schoene,* 276 U. S. 272; *Citizens Bank of Michigan City* v. *Opperman,* 249 U. S. 449.

Statutes Involved

The sections of the statutes of the Commonwealth of Pennsylvania involved are quoted below. Only the constitutionality of the limitation on the exemption of mutual savings banks is attacked, the limitation and exemption being italicized.

1. Sections 17 and 18 of the Act of the Commonwealth of Pennsylvania, approved May 18, 1937, P. L. 633, as amended by the Act of the Commonwealth of Pennsylvania, approved May 5, 1939, P. L. 46, as follows:

> "Section 17. State Tax on Scrip, Bonds, Et Cetera; Imposition and Rate of Tax.—All scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid by any and every private corporation, incorporated or created under the laws of this Commonwealth, or the laws of any other state or of the United States and doing business in this Commonwealth and having a resident

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corporate treasurer therein, except first class or non-profit corporations, are hereby made taxable for State purposes at the rate of eight mills on each dollar of the nominal value thereof, during the calendar years one thousand nine hundred thirty-eight, (and) one thousand nine hundred thirty-nine, one thousand nine hundred forty, and one thousand nine hundred forty-one, on reports filed for the calendar years one thousand nine hundred thirty-seven, (and) one thousand nine hundred thirty-eight, one thousand nine hundred thirty-nine, and one thousand nine hundred forty, or for any fiscal year beginning in the calendar years one thousand nine hundred thirty-seven, (and) one thousand nine hundred thirty-eight, one thousand nine hundred thirty-nine, and one thousand nine hundred forty, and at the rate of four mills on each dollar of the nominal value thereof during the calendar years one thousand nine hundred (forty) forty-two, and every year thereafter, on reports filed for the calendar years one thousand nine hundred (thirty-nine) forty-one, (or for any fiscal year beginning in the calendar year one thousand nine hundred (thirty-nine) forty-one, and for every year thereafter; and all scrip, bonds, certificates and evidences of indebtedness issued and all scrip, bonds, certificates and evidences of indebtedness assumed or on which interest shall be paid by any county, city, borough, township, school district or incorporated district of this Commonwealth, are hereby made taxable for State purposes at the rate of four mills on each dollar of the nominal value thereof during the calendar year one thousand nine hundred thirty-eight, and every year thereafter, on reports filed for the calendar year one thousand nine hundred thirty-seven, or for any fiscal year beginning in the calendar year one thousand nine hundred thirty-seven, and for every year thereafter: * * * Provided, That this section shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution or trust company, nor to interest-bearing accounts in any bank, banking institution, savings institution, employes' thrift or savings association, whether

operated by employes or the employer, or trust company: *And provided further, That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock, and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness, clear of and free from the tax, or any part thereof, provided for in this act, or in the act approved the seventeenth day of June, one thousand nine hundred thirteen (Pamphlet Laws, five hundred seven), or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, from paying the tax imposed herein on any of such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to, the said savings institution having no capital stock:* And provided further, That the provisions of this act shall not apply to fire companies, firemen's relief associations, life or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax, under this section, on the mortgages, bonds, and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, except as executor or administrator of the estate of a nonresident decedent, and except as trustee for a resident or nonresident religious, charitable or educational organization, no part of the net earnings of which inures to the benefit of any private stockholder or individual, shall be liable for the tax imposed by this section upon all

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securities so held by them as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for State purposes shall be taxed or taxable for county, school, or other local purposes: And provided further, That the provisions of this section shall not apply to personal property, of the classes hereinabove enumerated, received from any person or persons, copartnership or unincorporated association, or company, nonresident in or not located within this Commonwealth, or from any joint-stock association, limited partnership, bank or corporation formed, created, or incorporated by, under, or in pursuance of any law of the United States, or of any state or government other than this Commonwealth, by any person or persons, copartnership or unincorporated association resident in this Commonwealth, company, joint-stock company or association, limited partnership, bank or corporation created or existing under the laws of this Commonwealth or doing business within this Commonwealth as active trustee, agent, attorney-in-fact, or in any other capacity for the use, benefit or advantage of any person or persons, copartnership or unincorporated association, or company nonresident in, or not located within, this Commonwealth, or for the use, benefit or advantage of any joint-stock company or association, limited partnership, bank or corporation formed, created or incorporated by, under, or in pursuance of any law of the United States, or of any state or government other than this Commonwealth; or any such property whatsoever owned, held or possessed by any person or persons, copartnership or unincorporated association resident in this Commonwealth, company, joint-stock company or association, limited partnership, bank or corporation created and existing under the laws of this Commonwealth or doing business within this Commonwealth in the capacity of executor or administrator of a nonresident decedent, or as trustee, agent or attorney-in-fact for any resident or nonresident religious, charitable, scientific, literary or educational organization, no part of the net earnings

of which inures to the benefit of any private stockholder or individual. * * *"

"Section 18. Reports and Payments of the State Tax by Private Corporations and Municipalities.—(a) It shall be the duty of the resident treasurer of each private corporation, incorporated by or under the laws of this Commonwealth or the laws of any other state or of the United States or any foreign country, and doing business in this Commonwealth, except nonprofit corporations and cooperative agricultural associations not having capital stock and not conducted for profit, and it shall be the duty of the treasurer of each county, city, borough, township, school district or incorporated district of this Commonwealth, upon the payment of any interest on any scrip, bond, certificate or evidence of indebtedness issued or assumed by such corporation, county, city, borough, township, school district or incorporated district, or upon which it is liable for the payment of the interest to residents of this Commonwealth and held by them, to assess the tax imposed for State purposes by the seventeenth section of this act, upon the nominal value of each such scrip, bonds, certificates or evidences of indebtedness, and to report, under oath or affirmation, annually, on or before the fifteenth day of March, for the calendar year next preceding, to the department, the amount of such indebtedness owned, held or in any manner possessed by residents of this Commonwealth, together with such information as the department may require: Provided, That such scrip, bonds, certificates and evidences of indebtedness shall be deemed to be owned, held or possessed by residents of this Commonwealth, unless it is established that they are not so owned, held or possessed, and it shall be his further duty to deduct the tax, imposed by the seventeenth section of this act, on the payment of any interest upon such indebtedness and return the same to the State Treasury, through the department, within the time prescribed by law, and his compensation for his services shall be five per centum on the first one thousand dollars ($1,000.00), or frac-

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tional part thereof, one per centum on all amounts over one thousand dollars ($1,000.00) and not over two thousand dollars ($2,000.00), and one-half of one per centum on all amounts over two thousand dollars ($2,000.00). Upon the payment of said State tax, such scrip, bonds, certificates or evidences of indebtedness shall be exempt from all other taxation in the hands of the holder of the same.

"The time for filing reports may be extended, taxpayers may be permitted to file their reports on a fiscal year basis, and the procedure and penalties in case of failure to report and pay the tax shall be as prescribed by law.

"(b) It is the intent and meaning of this act that the tax for State purposes, imposed upon obligations of private and public corporations by section seventeen of this act, shall be collected in the same manner as the tax heretofore imposed for State purposes upon such obligations."

The Issues and the Ruling Below

On April 17, 1944, The New York, Chicago and St. Louis Railroad Company filed with the Court of Common Pleas of Dauphin County, its appeal from the Order of the Board of Finance and Revenue denying petition for review of settlement of the Corporate Loans Tax for the year 1941 in the sum of $26,865.41 on securities issued by the Railroad Company. A number of issues not pertinent to this appeal are raised in the appeal to the Court of Common Pleas of Dauphin County. The issue related to this appeal is contained in Paragraph 1 of the Specifications of Objections of the appeal to the Dauphin County Court, and complains of tax settled at the rate of eight mills for one year on $456,000 par value of appellant's securities held by mutual savings banks without capital stock incorporated in Pennsylvania, resulting in violation of Section 1, Article IX of the Constitution of the Commonwealth of Pennsylvania requiring

uniform taxation, and in arbitrarily and capriciously depriving the appellant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and impairment of contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.[1] The Corporate Loans Tax in Pennsylvania is a tax levied upon bonds and other securities and evidences of debt held by residents of Pennsylvania and issued or the payment assumed by Pennsylvania corporations and by corporations doing business in Pennsylvania. From 1891 until 1935 it was a four mill tax upon the par value of the bonds. In 1935 an Act was approved adding an additional mill, and in 1936 this Act was amended to all four mills instead of one mill, making the total tax eight mills. The present Act under which the 1941 tax was assessed was adopted in 1937, amended in 1939 and effected little change in the 1935 and 1936 Acts.

The tax is assessed and collected by the Treasurer of the corporation at the time interest is paid. If no interest is paid no tax is assessed or collected. By the decision of the Supreme Court of Pennsylvania in this case the corporation is construed to be the assessor and collector of the tax and this construction is not here questioned.

By the Act of the Commonwealth of Pennsylvania, approved May 1, 1909, P. L. 198, mutual savings banks without capital stock were added to the exempt classes of holders of otherwise taxable securities and evidences of debt with the proviso: "and if at any time, either now or hereafter, any persons, individuals or bodies corporate have agreed or shall hereafter agree to issue *his, their or its* securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing

[1] Page 7a Printed Record in Supreme Court of Pennsylvania.

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herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by or owing to said savings institution having no capital stock."

This proviso was continued in effect until the Act of 1937 when a material change occurred as follows:

> "and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness, clear of and free from the tax, or any part thereof, provided for in this act, or in the act approved the seventeenth day of June, one thousand nine hundred thirteen (Pamphlet Laws, five hundred seven), or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, from paying the tax imposed herein on any of such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to, the said savings institution having no capital stock:"

The obvious purpose of this proviso was to continue in force the obligation of the corporation issuing the bond to pay the tax which it had agreed to pay for the taxpayer. The holder of the bonds was exempted. The issuer of the bonds continued to pay the holder's tax. "A's" tax was imposed upon "B". The debtor had to pay the creditor's tax from the payment of which the creditor had been excused.

Since, however, the Corporate Loans Tax had been and still is uniformly held by the courts of Pennsylvania to be a tax upon property (*Commonwealth of Pennsylvania* v. *Lehigh Valley Railroad Company*, 104 Pa. 89; *Commonwealth* v. *Lehigh Valley Railroad Co.*, 186 Pa. 235, 246, 40 A. 491, 492; *In re Wyoming Valley Ice Co.*, 145 F. 267; *Com-*

monwealth v. *Jessup & Moore Paper Co.*, 31 Dauph. 273; *Commonwealth* v. *Safe Harbor Water Power Corporation*, 43 Dauph. 415) both the lower court and the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Lehigh Valley R. R. Co.*, 244 Pa. 241, 90 A. 564, did not accept the obvious purpose of the proviso. Instead they held that the tax remained upon the tax-free-covenant bonds in the hands of mutual savings banks without capital stock in Pennsylvania, while exempting bonds in the hands of mutual savings banks without capital stock, which did not contain such covenant. Thus, the mutual savings banks without capital stock held two classes of bonds, one taxable and the other not taxable. The obligation of the corporation to pay the tax referred to in the proviso was its obligation as collector of the tax for the Commonwealth, and not the obligation imposed by its covenant. The covenant merely tagged the bond for classification. Since the tax remained on the bond, the covenant to pay the tax was kept active. The amendment to the proviso in the Act of 1937 was probably intended to bring its wording more in conformity with the interpretation put on the proviso in the first Act by the Supreme Court (*Commonwealth* v. *Lehigh Valley Railroad Company, supra*).

Certain corporations in their covenants limited the amount of tax they would pay to four mills, while other corporations placed no limit on the amount of Corporate Loans Tax they would pay on behalf of the holder of the bonds. When the Act of 1936 was passed adding four mills to the four mills already imposed, the Commonwealth, under the construction placed upon the Act by the Supreme Court of Pennsylvania requiring the corporations which agreed to pay only four mills of such tax to collect the additional four mills from the mutual savings banks without capital stock, should have collected the additional tax on bonds

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with tax-free covenants. This the Commonwealth refused to do and limited the payment of the tax on such bonds to the four mills which the corporations had agreed to pay.[2] This policy of the Commonwealth was continued under the Act of 1937 and its amendments.

Because the appellant had a covenant to pay whatever tax might be imposed, the Court of Common Pleas of Dauphin County in the instant case sustained in full the eight mills of tax imposed on $456,000.00 of appellant's securities held by mutual savings banks without capital stock containing tax-free-covenant clauses. It dismissed the attack on the constitutional validity of the proviso imposing the tax, by referring to a companion case wherein is the simple statement that it was in the power of the Commonwealth to impose the tax, citing the case of *Commonwealth* v. *School District of Pittsburgh*, 343 Pa. 394, which had upheld the authority of the earlier case of *Commonwealth* v. *Lehigh Valley R. R. Co., supra.*

The appellant took an exception to this conclusion of the Court of Common Pleas of Dauphin County as follows:

> "9. The learned trial judge erred in failing to conclude that the imposition of liability upon the defendant to pay over the corporate loans tax involved in this case unconstitutionally deprived the defendant of its property without due process of law and denied to it the equal protection of the law."[3]

The appellant also took exception to the finding of the trial judge that the defendant was liable for the tax on its tax-free covenant bonds held by Pennsylvania mutual savings institutions having no capital stock. The court overruled the exceptions. The appellant also took exception to the

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[2] Page 77a Printed Record in Supreme Court of Pennsylvania.

[3] Page 79a Printed Record in Supreme Court of Pennsylvania.

judgment of the trial judge sustaining settlement of the tax. Both exceptions were overruled.[4]

The overruling of the exceptions was assigned as error in an appeal taken to the Supreme Court of Pennsylvania.[5] It sustained the judgment of the Court of Common Pleas of Dauphin County in the matter involved in this appeal as well as on other points. In the matter of the constitutional validity of continuing the tax on tax-free-covenant bonds of the appellant held by mutual savings banks without capital stock, it contented itself with referring to the two cases in which the point had already been settled—*Commonwealth* v. *Lehigh Valley R. R. Co., supra,* and *Commonwealth* v. *Pittsburgh School District, supra.*

It is the contention of The New York, Chicago and St. Louis Railroad Company that:

1. The continuing in force of the obligation of the appellant below under the tax-free-covenant clauses in bonds held by mutual savings banks without capital stock compels appellant below to pay a tax on property not owned by it but owned and held by mutual savings banks without capital stock, thereby depriving appellant below of its property without due process of law and denying to it the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The construction of the proviso of the taxing statute by the Supreme Court of Pennsylvania whereby bonds, securities and other evidences of debt held by mutual savings banks without capital stock are placed in two classes—those containing no tax-free-covenant clauses and those containing tax-free-covenant clauses—is arbitrary and

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[4] Pages 79a and 80a Printed Record in Supreme Court of Pennsylvania.

[5] Pages 3 and 4 Printed Brief of Appellant in Supreme Court of Pennsylvania.

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capricious classification in that while non-tax-free-covenant bonds in the hands of mutual savings banks without capital stock are exempt from tax, tax-free-covenant bonds continue to be subject to tax solely for the purpose of keeping active for the benefit of the Commonwealth, a covenant which existed only for the benefit of the holder of the bonds. The appellant below is thereby denied the equal protection of the law and deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The Questions Are Substantial

The questions submitted in this appeal are substantial and important. Aside from the amount of tax at stake, which is considerable, there is the principle involved of whether or not a State may arbitrarily use the power of classification of property solely for the purpose of nullifying a right under the Federal Constitution.

In this case the Legislature of Pennsylvania exempted from the corporate loans tax of that State corporate bonds held by mutual savings banks without capital stock located in the State. Quite a number of classes of holders of bonds exempt from the tax had been established, and no exception is taken to classifying these banks for purposes of tax exemption. They are founded to enable people of few means to secure a better return on their savings than is elsewhere available while retaining all the usual safeguards. They have many cooperative features. They are an object of special regard of the State.

The objection of the appellant comes when the State taxes corporate bonds with tax-free-covenant clauses in the hands of these tax exempt savings banks without capital stock and imposes the tax on the issuer of the bonds. The covenant of the issuing corporation had become dormant.

To compel the covenantor now to pay the tax was compelling it to do more than it had agreed to do.

On its face, this imposes a property tax on property not owned. The property, corporate bonds, are owned by the mutual savings banks. The tax is paid by the issuing corporation, a party who has no title to the bonds. The Legislature apparently had seized upon the fact that the obligor of the bonds had some relationship to them and thereby attempted to impose the tax upon it. But the obligor has no property interest in its own obligations. The obligee owns the obligations. The dangerous doctrine is established that the State may impose upon the debtor a tax properly due and owing by the creditor, but no similar attempt has been made by any other State or by the Federal Government so far as can be found.

It has been settled that the State cannot tax "B" for the property owned by "A". *Schlessinger* v. *State of Wisconsin,* 270 U. S. 230; *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Heiner* v. *Donnan,* 285 U. S. 312.

The dissent in the cases just cited did not in any way attempt to deny the rule that the State could not collect taxes against "B" on property owned by "A". That proposition has never been doubted.

The Pennsylvania Supreme Court has tried to get around this unconstitutional taking of property, by construing the taxing Act to set up two classes of bonds in the portfolios of the mutual savings banks without capital stock, those without tax-free covenants being exempt and those with tax-free covenants being subject to the tax. Mark you, the tax-free-covenant bonds are taxed in the hands of and as the property of the mutual savings banks under this construction. This keeps alive the covenant of the issuer of the bonds in the eyes of the Pennsylvania courts. The issuer being bound, must pay the tax. Thus is avoided the em-

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barrassment of saying that "B" is being taxed for property of "A". A borrower, foolishly or otherwise, in order to secure funds, promises the lender to pay any taxes that are levied on the obligation. The State exempts the lender from paying tax, except tax on obligations which the debtor has agreed to pay. Such obligations in his hands are classified by the agreement to pay the tax in order to keep alive the agreement to pay the tax.

It is insisted that "B" is still being taxed for property of "A", despite the construction of the Supreme Court of Pennsylvania. While the Supreme Court of the United States considers itself concluded by the ordinary construction of a statute by the State court of last resort, in a question of whether a tax statute deprives a party of rights secured by the Federal Constitution, it does not look to the form in which the taxing scheme is cast nor to the characterization of that scheme as adopted by the State court. The operation and effect of the tax, the substance and not the form is considered. *St. Louis Southwestern Railway Company* v. *Arkansas ex rel. Norwood,* 235 U. S. 350, 362, 363; *Senior* v. *Braden,* 295 U. S. 422, 429; *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania,* 296 U. S. 113, 119.

When the Commonwealth of Pennsylvania raised the corporate loans tax from four mills to eight mills it did not, in the case of an issuer of bonds who had agreed to pay only four mills of tax for the holder, collect the additional four mills from the mutual savings bank without capital stock which held the bonds. This it should have done under the ruling of the Pennsylvania courts. It disregarded the ruling and contented itself with collecting only four mills from the issuer of the bonds, itself. This disregard is particularly flagrant under the amendment of the proviso in the Act of 1937 and its amendment which specifically im-

poses the tax regardless of the amount of tax which the covenant agrees to pay.

It is respectfully submitted that real and substantial questions are presented in this case.

ROBERT M. FISHER,
JOHN Y. SCOTT,
Counsel for The New York, Chicago and St. Louis Railroad Company.

This 24th day of September, 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 645 and 646

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLANT

IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

Reference to the Official Report of the Opinion Delivered in the Court Below.

Two cases involving essentially the same questions were argued together in the Supreme Court of Pennsylvania and one opinion covering both cases was handed down by that Court. This opinion is reported at No. 354 Pa. 355, 47A (2d) 272. An appeal to this Court was taken from the judgments in both cases, in each of which a Motion to Dismiss or Affirm and a Statement Opposing Jurisdiction were filed. This brief is filed in opposition to the Motion and the Statement in both cases.

II

A Concise Statement of the Grounds on which the Jurisdiction of the Supreme Court of the United States Is Invoked.

This already appears in the Statement as to Jurisdiction already filed in this case and is not here repeated.

III

A Concise Statement of the Case

On April 17, 1944, The New York, Chicago and St. Louis Railroad Company filed with the Court of Common Pleas of Dauphin County, two appeals from Orders of the Board of Finance and Revenue of Pennsylvania denying petitions for review of settlements of the Corporate Loans Tax for the year 1937 and for the year 1941 in the sum of $40,972.86 and in the sum of $26,865.41 respectively, on securities issued by the Railroad Company. A number of issues not pertinent here are raised in the appeals to the Court of Common Pleas of Dauphin County. The issue here is contained in Paragraph 5 of the respective Specifications of Objections of the appeals to the Dauphin County Court, and complains of tax settled at the rate of eight mills for one year on $795,000 par value for 1937 and on $456,000 par value for 1941 of appellant's securities held by mutual savings banks without capital stock incorporated in Pennsylvania, resulting in violation of Section 1, Article IX of the Constitution of the Commonwealth of Pennsylvania requiring uniform taxation, and in arbitrarily and capriciously depriving the appellant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and impairment of contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States. The Corporate Loans Tax in Pennsylvania is a tax levied upon bonds and other securities and evidences of debt held by residents of Pennsylvania and issued

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or the payment assumed by Pennsylvania Corporations and by corporations doing business in Pennsylvania. The basic Act imposing the tax was enacted in 1885. From 1891 until 1935 it was a four mill tax upon the par value of the bonds. In 1935 an Act was approved adding an additional mill, and in 1936 this Act was amended to add four mills instead of one mill, making the total tax eight mills. The Act under which the 1941 tax was assessed was adopted in 1937, amended in 1939, and continued the eight mills of tax.

The tax is assessed and collected by the Treasurer of the corporation at the time interest is paid. If no interest is paid no tax is assessed or collected. By the decision of the Supreme Court of Pennsylvania in these cases the corporation is construed to be the assessor and collector of the tax and this construction is not here questioned.

By the Act of the Commonwealth of Pennsylvania, approved May 1, 1909, P.L. 198, mutual savings banks without capital stock were added to the exempt classes of holders of otherwise taxable securities and evidences of debt with the proviso: "and if at any time, either now or hereafter, any persons, individuals or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by or owing to said savings institution having no capital stock."

The obvious purpose of this proviso was to continue in force the obligation of the corporation issuing the bond to pay the tax which it had agreed to pay for the taxpayer. The holder of the bonds was exempted. The issuer of the bonds continued to

pay the holder's tax. "A's" tax was imposed upon "B". The debtor had to pay the creditor's tax from the payment of which the creditor had been excused.

Since, however, the Corporate Loans Tax had been and still is uniformly held by the courts of Pennsylvania to be a tax upon property (Commonwealth of Pennsylvania v. Lehigh Valley Railroad Company, 104 Pa. 89; Commonwealth v. Lehigh Valley Railroad Co., 186 Pa. 235, 246, 40 A. 491, 492; In re Wyoming Valley Ice Co., 145 F. 267; Commonwealth v. Jessup & Moore Paper Co., 31 Dauph. 273; Commonwealth v. Safe Harbor Water Power Corporation, 43 Dauph. 415; Appeal of Fidelity-Philadelphia Trust Company, 354 Pa. 355, 47 A. (2d) 267) both the lower Court and the Supreme Court of Pennsylvania in the case of **Commonwealth v. Lehigh Valley Railroad Co., 244 Pa. 241, 90 A. 564**, did not accept the obvious purpose of the proviso. Instead they held that the tax remained upon the tax-free covenant bonds in the hands of mutual savings banks without capital stock in Pennsylvania, while exempting bonds in the hands of mutual savings banks without capital stock, which did not contain such covenant. Thus, the mutual savings banks without capital stock held two classes of bonds, one taxable and the other not taxable. The obligation of the corporation to pay the tax referred to in the proviso, was its obligation as collector of the tax for the Commonwealth, and not the obligation imposed by its covenant. The covenant merely tagged the bond for classification. Since the tax remained on the bond, the covenant to pay the tax was kept active.

The amendment and proviso provided for in the Act of 1909 continued in force until 1937 when the proviso was amended to read as follows:

> "and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or

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other evidences of indebtedness, clear of and free from the tax, **or any part thereof,** provided for in this act, or in the act approved the seventeenth day of June, one thousand nine hundred thirteen (Pamphlet Laws, five hundred seven), or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, **from paying the tax imposed herein** on any of such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owed to, the said savings institution having no capital stock;" Act of May 18, 1937, P. L. 633.

It will be noted that the wording of the amended proviso conforms with the interpretation put upon it by the Supreme Court of Pennsylvania in Commonwealth vs. Lehigh Valley Railroad Company, supra.

Certain corporations in their covenants limited the amount of tax they would pay to four mills, while other corporations placed no limit on the amount of Corporate Loans Tax they would pay on behalf of the holder of the bonds. When the Act of 1936 was passed adding four mills to the four mills already imposed, the Commonwealth, under the construction placed upon the Act by the Supreme Court of Pennsylvania requiring the corporations which agreed to pay only four mills of such tax to collect the additional four mills from the mutual savings banks without capital stock, should have collected from mutual savings banks the additional tax on bonds with tax-free covenants. This the Commonwealth refused to do and limited the payment of the tax on such bonds to the four mills which the corporations had agreed to pay. This policy of the Commonwealth was continued under the Act of 1937 and its amendments.

Because the appellant had a covenant to pay whatever tax might be imposed, the Court of Common Pleas of Dauphin County in the instant case sustained in full the eight mills of

tax imposed on appellant's securities held by mutual savings banks without capital stock containing tax-free-covenant clauses. In both cases it dismissed the attack on the constitutional validity of the proviso imposing the tax on the authority of the case of Commonwealth vs. School District of Pittsburgh, 343 Pa. 394, 23 A. (2d) 496, which had upheld the authority of the earlier case of Commonwealth vs. Lehigh Valley Railroad Company, supra.

The appellant took an exception in both cases to this conclusion of the Court of Common Pleas of Dauphin County as follows:

> "9. The learned trial judge erred in failing to conclude that the imposition of liability upon the defendant to pay over the corporate loans tax involved in this case unconstitutionally deprived the defendant of its property without due process of law and denied to it the equal protection of the law."

The appellant also took exception in both cases to the finding of the trial judge that the defendant was liable for the tax on its tax-free covenant bonds held by Pennsylvania mutual savings institutions having no capital stock. The appellant also took exception to the judgment of the trial judge sustaining settlement of the tax. All exceptions were overruled. The overruling of the exceptions was assigned as error in the appeals taken to the Supreme Court of Pennsylvania. It sustained the judgments of the Court of Common Pleas of Dauphin County in the matter here involved as well as on other points. As to the constitutional validity of continuing the tax on tax-free-covenant bonds of the appellant held by mutual savings banks without capital stock, it contented itself with referring to the two cases in which the point had already been settled, — **Commonwealth vs. Lehigh Valley Railroad Co.**, supra, and **Commonwealth vs. Pittsburgh School District**, supra.

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It is the contention of The New York, Chicago and St. Louis Railroad Company that:

1. The continuing in force of the obligation of the appellant below under the tax-free covenant clauses in bonds held by mutual savings banks without capital stock compels appellant to pay a tax on property not owned by it but owned and held by mutual savings banks without capital stock, thereby depriving appellant of its property without due process of law and denying to it the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The construction of the proviso of the taxing statute by the Supreme Court of Pennsylvania whereby bonds, securities and other evidences of debt held by mutual savings banks without capital stock are placed in two classes, — those containing no tax-free covenant clauses and those containing tax-free covenant clauses — is arbitrary and capricious classification in that while non-tax-free-covenant bonds in the hands of mutual savings banks without capital stock are exempt from tax, tax-free covenant bonds continue to be subject to tax solely for the purpose of keeping active for the benefit of the Commonwealth, a covenant which existed only for the benefit of the holder of the bonds. The appellant below is thereby denied the equal protection of the law and deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

IV.

Specification of Such of the Assigned Errors as Are Intended to Be Urged.

It is intended to urge all of the assigned errors.

V.

Argument

This brief is filed in opposition to the "Motion to Dismiss or Affirm" and to the "Statement Opposing Jurisdiction" filed in these cases by the Commonwealth of Pennsylvania, the appellee. In both cases the Motion and the Statement are identical.

The Commonwealth of Pennsylvania in its Statement Opposing Jurisdiction makes its first ground of opposition the construction by the Supreme Court of Pennsylvania of the Act of May 1, 1909, P. L. 298. As so construed, the Act exempts bonds without tax-free covenant clauses in the hands of mutual savings banks without capital stock from the corporate loans tax of Pennsylvania, but continues the tax on bonds with tax-free covenant clauses in the hands of mutual savings banks without capital stock. The Supreme Court of the United States is bound by this construction. The question is whether the statute as so construed deprives the appellant of rights secured by the Federal Constitution. Under such circumstances this Court does not look to the form in which the taxing scheme is cast or to the characterization of that scheme as adopted by the State Court. The operation and effect of the tax, the substance and not the form is considered. St. Louis Southwestern Railway Company vs. Arkansas ex rel. Norwood, 235 U. S. 350, 362, 363, 35 S. Ct. 99, 59 L. Ed. 265; Senior vs. Braden, 295 U. S. 422, 429, 55 S. Ct. 800, 79 L. Ed. 520; Schuylkill Trust Co. vs. Commonwealth of Pennsylvania, 296 U. S. 113, 119, 56 S. Ct. 31, 80 L. Ed. 91.

It is observed that the Act of 1909 did not set forth in so many words the construction given it by the Pennsylvania Courts. It merely provided that for bodies corporate which had agreed or would thereafter agree to issue its securities clear of

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and free from the four mill tax therein provided for or with covenant to pay the same, nothing in the Act should be so construed as to relieve them from paying the said four mills tax on any of such securities owned by a mutual savings institution having no capital stock despite the exemption granted these institutions.

Obviously the Court could not construe the Act to mean that the mutual savings banks were exempt from paying the tax on corporate bonds held by it, while tax-free covenant clauses in such bonds would continue to bind the covenantors. That would mean that the debtor would continue to have to pay the creditor's tax, although the creditor was exempt from the tax. The debtor had only agreed to pay such tax as might be levied against the creditor. The State was not in privity with such a contract and could not enforce it against the debtor. Nehalem Timber & Logging Co. vs. Columbia County, 97 Ore. 100, 189 P. 212; Brewer vs. Davidson, 195 Okla. 654, 163 P. (2d) 987. Nor on the face of things is the State a third party beneficiary.

Such construction would reduce the statute to an attempt on the part of the State to tax "B" for the property owned by "A". By virtue of the exemption there was no further obligation on the part of the issuer of the bonds to pay the tax, and no one could collect from it unless the State had the naked power to keep alive a covenant to pay a tax which by its terms had become dormant. The exercise of such naked power comes down to the taxing of "B" for the property of "A". It has been settled that the State cannot do this. Schlessinger vs. State of Wisconsin, 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 260; Hoepfer vs. Tax Commission, 284 U. S. 206, 76 L. Ed. 248, 52 S. Ct. 120; Heiner vs. Donnan, 285 U. S. 312, 76 L. Ed. 772, 52 S. Ct. 358.

The dissents in the cases just cited did not in any way attempt to deny the rule that the State could not collect tax against "B"

on property owned by "A". That proposition has never been doubted.

The Supreme Court of Pennsylvania did not take this obvious but unconstitutional construction. In order to avoid it, it fell back upon the power of the State to classify objects of taxation. As stated above, it held that the mutual savings banks without capital stock held two classes of corporate bonds, one with tax-free covenants and one without tax-free covenants. Commonwealth v. Lehigh Valley Railroad Co., 244 Pa. 241, 90 A. 564. The effect of this was to continue the obligation of the issuing corporation to pay the tax, since the tax still obtains on the class of bonds which have a tax-free covenant clause. The Pennsylvania Courts see no objection to this since all members of the class who hold the bonds, to-wit, mutual savings banks without capital stock, are treated alike. There is no discrimination.

But the point the appellant wishes to urge is that this is not a question of discrimination within a class. It is a question of using classification so as to tax "B" for property held by "A". It is the sole purpose of the classification and therefore arbitrary and capricious. There is the contrary of a reasonable basis for the classification. It is submitted there is a substantial question presented.

Highlighting the arbitrary and unreasonable purpose of the classification is the action of the tax officials of Pennsylvania taken when the millage of the corporate loans tax was raised from four to eight mills. The Act of June 17, 1913, P. L. 507, as supplemented by the Act of July 17, 1936, P. L. 51, under which the 1937 tax of eight mills was assessed, continued the restriction on the exempt bonds held by mutual savings banks which prevailed when the tax was four mills, and in so doing said: "If at any time either now or hereafter . . . bodies corporate have agreed or shall hereafter agree to issue . . . its

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securities . . . clear of and free from the said four mills tax herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt . . . it . . . from paying the said four mills tax on . . . such securities . . . as may be held, owed by or owing to the said savings institutions having no capital stock."

The record shows that where the covenants of the bonds limited the payment of the tax to four mills, only four mills was collected while on bonds having covenants agreeing to pay all the tax, eight mills was collected.

The technical application of the Act would either apply to no bonds whatsoever since there was no four mills tax in 1937, or would at least relieve the bonds with an unlimited tax covenant clause from any tax. The next year the Act of May 18, 1937, P. L. 633 (amended by the Act of May 5, 1939, P. L. 46) under which the 1941 tax was assessed, corrected the defect in the 1936 Act by providing that "if at any time either now or hereafter . . . bodies corporate have agreed or shall hereafter agree to issue . . . its securities . . . clear of and free from the tax, or any part thereof, provided for in this Act, or in the Act approved the seventeenth day of June one thousand nine hundred and thirteen (Pamphlet Laws 507), or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve . . . it . . . , from paying the tax imposed herein on any of such securities . . . , as may be held, owned by, or owing to the said savings institutions having no capital stock."

It is a serious question if the 1937 Act went so far as to affect taxes imposed for the year 1937. They were imposed under the Acts of 1913 and 1936.

There is no question, however, that in 1941 all bonds with tax-free covenants held by mutual savings banks without cap-

ital stock were taxable in the hands of the mutual savings banks under the wording of the 1937 Act and its amendment. Such of those bonds which limited assumption of the tax to only four mills of the tax left the mutual savings banks to pay the other four mills of tax. It was the duty of the Corporation issuing such bonds to deduct the additional four mills from interest paid to the mutual savings banks. This it did not do either in 1937 or in 1941 because of the ruling of the tax officials of Pennsylvania, that only four mills of tax was payable in such cases. Therefore, in the class of tax-free covenant bonds held by mutual savings banks, the Commonwealth failed to observe the tax statute requiring the collection of the full eight mills when the covenant limited the assumption of tax to four mills and discriminated against bonds with unlimited covenants by assessing the covenantor for eight mills of tax. Within the class itself those bonds with covenants limiting payment of tax to four mills were placed in an advantageous position over those with unlimited covenants.

It is further significant that as to nine other classes of institutions exempt from the assessment of the loans tax upon bonds in their possession, this exemption has no restricting proviso but is full and complete itself.

The second ground of the Commonwealth of Pennsylvania given in the Statement Opposing Jurisdiction contends that the exemption is inextricably integrated with the proviso limiting it and falls if the proviso falls. If the proviso is unconstitutional, the exemption is also unconstitutional; and the issuer of the bonds in the hands of mutual savings banks without capital stock is still bound by his covenant and therefore not hurt if the proviso is unconstitutional. This places the appellant in a position of not being able to complain of the unconstitutionality of the proviso.

It should be noted that the Pennsylvania Court does not in

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Commonwealth v. Lehigh Valley Railroad, supra, nor in any other of its opinions on the question state that the legislature would not have exempted the bonds unless the exemption were modified by the proviso. True it is that it does say that the exemption and proviso must be read together; that the intention of the legislature was to favor savings institutions, and not to benefit the issuing corporations; and that the legislative intention was to retain the tax. It is significant that it does not go on to say that there would have been no exemption without the proviso.

Undoubtedly the exemption standing alone would be constitutional. Mutual savings banks are of such a character as to warrant exemption. They held $1,086,920,135.40 of assets as of June 30, 1946 and were founded for the benefit of people of few means. They had as of June 30, 1946, 1,164,186 depositors. The safeguards thrown around them, their co-operative characteristics, the return they give their depositors and other features make them a special regard of the State. They are of a piece with mutual fire and life insurance companies which are exempt from tax without proviso attached. That the proviso attached to the exemption of mutual savings banks would be unconstitutional, does not of necessity mean that the exemption itself is unconstitutional. It could stand on its own feet. To assert that the legislature meant that the proviso, if unconstitutional, should also render the exemption unconstitutional is a mere speculation for which there is no basis in the record, in the opinions of the Courts below or in the law. The legislature may have wished to retain the tax, but it does not appear that it wished to retain the tax at the expense of the exemption. The Commonwealth cannot postulate the argument that the exemption falls with the proviso as the conclusion of the Pennsylvania Courts at this stage of the proceedings.

The third ground of the Commonwealth of Pennsylvania

given in the Statement Opposing Jurisdiction has been answered already in discussing the first and second grounds, except where the Commonwealth states that if the exemption were extended to bonds of corporations which had assumed the payment of taxes there would be discrimination against bonds of corporations which did not happen to be held by savings institutions. There are nine other classes of exempt institutions provided for in the Act. If any one of these institutions did not hold bonds of certain corporations, then, following the argument of the Commonwealth, those corporations are discriminated against and the exemption is unconstitutional. In order to retain their exemption, the exempt institutions would have to hold bonds of all corporations in order not to discriminate against any. The absurdity of the proposition is evident. The constitutionality of the other classes of exempt holders has never been questioned and a fortiori the exemption of mutual savings banks without capital stock of itself would stand.

It is therefore respectfully submitted that real and substantial questions are presented in this case and that the Supreme Court of the United States has jurisdiction thereof.

Robert M. Fisher,
John Y. Scott,
Counsel for The New York, Chicago and St. Louis Railroad Company.

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APPENDIX

Motion to Dismiss or Affirm

Now comes the Appellee, the Commonwealth of Pennsylvania, and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this Court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In support of this motion the Appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

COMMONWEALTH OF PENNSYLVANIA
By:

George W. Keitel,
Deputy Attorney General.
James H. Duff,
Attorney General.

Statement Opposing Jurisdiction

Now comes the Appellee, the Commonwealth of Pennsylvania, and submits herewith its statement of reasons why the above-entitled case presents no substantial Federal question so as to justify the jurisdiction of the Supreme Court of the United States, as asserted by the Appellant.

1. The appeal from the judgment of the court below sustaining the imposition of the corporate loans tax of Pennsylvania presents no substantial question. Appellant's Assignment of Errors discloses that the sole ground for appeal is the alleged invalidity of the provision in the Pennsylvania Corporate Loans Tax Act exempting securities held by mutual savings banks without capital stock, as modified by the proviso that

securities containing tax-free covenants are subject to the said tax. As long ago as 1914 the Supreme Court of Pennsylvania has construed the said proviso as being "intended to preserve the tax on corporate securities owned or held by savings institutions which had no capital stock, where in and by the securities themselves the institutions were already relieved, and needed no legislative exemption": **Commonwealth v. Lehigh Valley Railroad Company,** 244 Pa. 241, 90 A. 564 (1914). This construction of the proviso was concurred in by the Supreme Court of Pennsylvania as recently as 1942 in **Commonwealth v. School District of Pittsburgh,** 343 Pa. 394, 23 A. (2d) 496 (1942). Under such interpretation of the tax statute by the Supreme Court of Pennsylvania, no substantial Federal question can be raised.

2. Since the said proviso merely limits the exemption and is inextricably integrated with it, it could not be unconstitutional unless the exemption were unconstitutional. Even if the exemption were unconstitutional, the Appellant herein would have to pay the tax on the securities involved in the present case. Therefore, the Appellant cannot be injured by the decision of the Supreme Court of Pennsylvania applying the tax to its securities: **Hermann Estate,** 349 Pa. 230, 36 A. (2d) 804 (1944).

3. It has been the policy of the Pennsylvania Legislature to exempt from taxation bonds held by savings institutions having no capital stock. When the corporation which issues such bonds undertakes to assume the payment of all taxes, the reason for the exemption disappears and the tax is ultimately paid by the corporation. This does not result in multiple classification. On the contrary, it preserves in the only manner possible the exemption in favor of savings institutions having no capital stock. If the exemption were to so overlap that it extended to the corporations which had assumed the payment of taxes when

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the bonds were issued, as Appellant contends it should, discrimination would exist against any such corporation which did not happen to have any bonds held by such savings institutions.

For the foregoing reasons, none of the questions raised on this appeal are of substance.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
By:

George W. Keitel,
Deputy Attorney General.

Of Counsel for Appellee.

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OCT 25
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 645

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

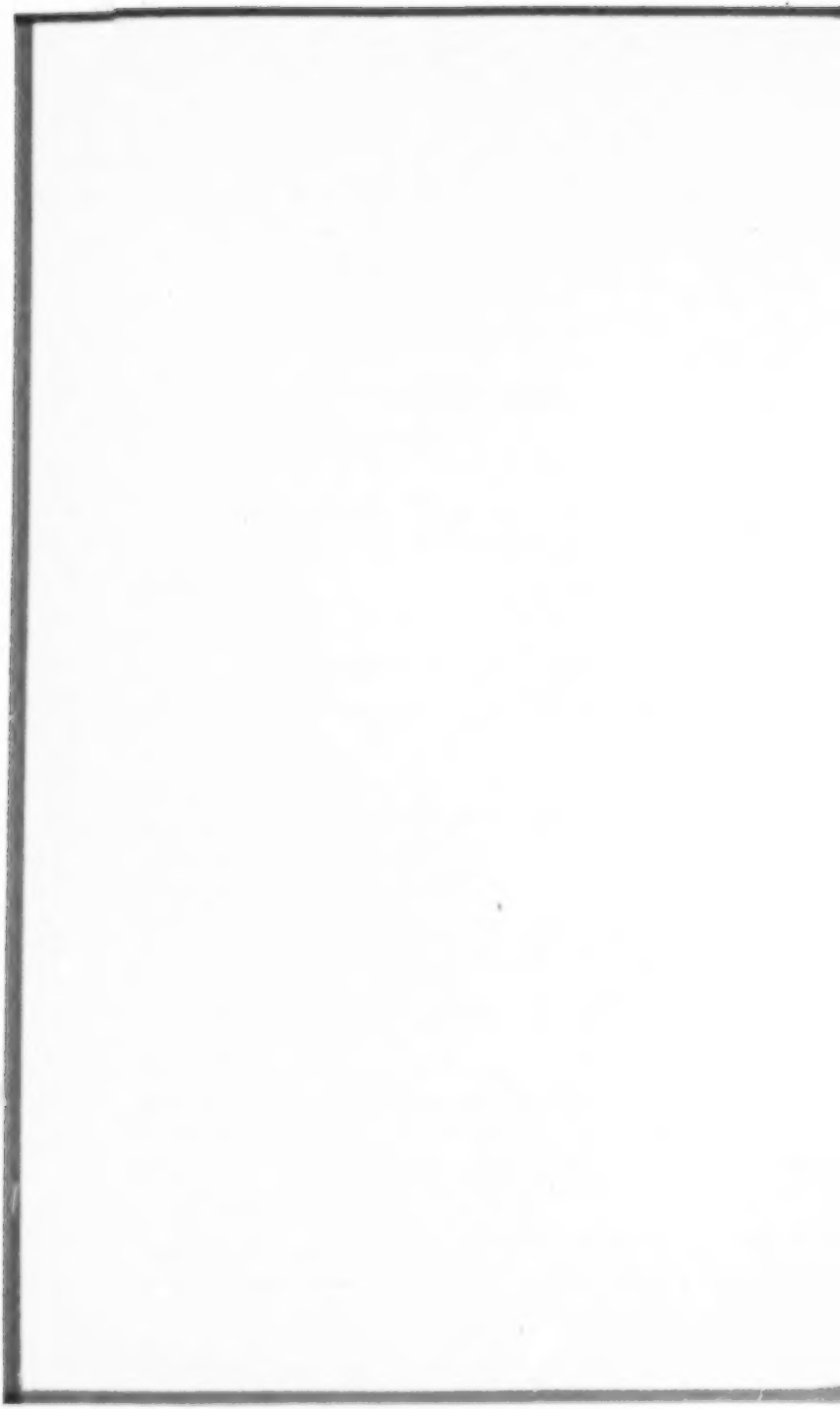
vs.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES H. DUFF,
Attorney General of Pennsylvania;
GEORGE W. KEITEL,
Deputy Attorney General of Pennsylvania,
Counsel for Appellee.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 645

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Commonwealth* v. *New York, Chicago and St. Louis Railroad Company*, No. 13, May Term, 1946 (354 Pa. 388, 47 A. (2d) 272).

STATEMENT OPPOSING JURISDICTION

Now comes the Appellee, the Commonwealth of Pennsylvania, and submits herewith its statement of reasons why the above-entitled case presents no substantial Federal question so as to justify the jurisdiction of the Supreme Court of the United States, as asserted by the Appellant.

1. The appeal from the judgment of the court below sustaining the imposition of the corporate loans tax of Penn-

sylvania presents no substantial question. Appellant's Assignment of Errors discloses that the sole ground for appeal is the alleged invalidity of the provision in the Pennsylvania Corporate Loans Tax Act exempting securities held by mutual savings banks without capital stock, as modified by the proviso that securities containing tax-free covenants are subject to the said tax. As long ago as 1914 the Supreme Court of Pennsylvania has construed the said proviso as being "intended to preserve the tax on corporate securities owned or held by savings institutions which had no capital stock, where in and by the securities themselves the institutions were already relieved, and needed no legislative exemption": *Commonwealth* v. *Lehigh Valley Railroad Company*, 244 Pa. 241, 90 A. 564 (1914). This construction of the proviso was concurred in by the Supreme Court of Pennsylvania as recently as 1942 in *Commonwealth* v. *School District of Pittsburgh*, 343 Pa. 394, 23 A. (2d) 496 (1942). Under such interpretation of the tax statute by the Supreme Court of Pennsylvania, no substantial Federal question can be raised.

2. Since the said proviso merely limits the exemption and is inextricably integrated with it, it could not be unconstitutional unless the exemption were unconstitutional. Even if the exemption were unconstitutional, the Appellant herein would have to pay the tax on the securities involved in the present case. Therefore, the Appellant cannot be injured by the decision of the Supreme Court of Pennsylvania applying the tax to its securities: *Hermann Estate*, 349 Pa. 230, 36 A. (2d) 804 (1944).

3. It has been the policy of the Pennsylvania Legislature to exempt from taxation bonds held by savings institutions having no capital stock. When the corporation which issues such bonds undertakes to assume the payment of all taxes,

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the reason for the exemption disappears and the tax is ultimately paid by the corporation. This does not result in multiple classification. On the contrary, it preserves in the only manner possible the exemption in favor of savings institutions having no capital stock. If the exemption were to so overlap that it extended to the corporations which had assumed the payment of taxes when the bonds were issued, as Appellant contends it should, discrimination would exist against any such corporation which did not happen to have any bonds held by such savings institutions.

For the foregoing reasons, none of the questions raised on this appeal are of substance.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
JAMES H. DUFF,
Attorney General,
By GEORGE W. KEITEL,
Deputy Attorney General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 645

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Commonwealth* v. *New York, Chicago and St. Louis Railroad Company*, No. 13, May Term, 1946 (354 Pa. 388, 47 A. (2d) 272).

MOTION TO DISMISS OR AFFIRM

Now comes the Appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this Court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause de-

pends, are so unsubstantial as not to need further argument. In support of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

COMMONWEALTH OF PENNSYLVANIA,
By GEORGE W. KEITEL,
Deputy Attorney General,
JAMES H. DUFF,
Attorney General.

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OCT 25

CHARLES ELMOR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 646

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES H. DUFF,
Attorney General of Pennsylvania;
GEORGE W. KEITEL,
Deputy Attorney General of Pennsylvania,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 646

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Commonwealth* v. *New York, Chicago and St. Louis Railroad Company*, No. 14, May Term, 1946 (354 Pa. 388, 47 A. (2d) 272).

STATEMENT OPPOSING JURISDICTION

Now comes the Appellee, the Commonwealth of Pennsylvania, and submits herewith its statement of reasons why the above-entitled case presents no substantial Federal question so as to justify the jurisdiction of the Supreme Court of the United States, as asserted by the Appellant.

1. The appeal from the judgment of the court below sustaining the imposition of the corporate loans tax of Pennsylvania presents no substantial question. Appellant's

Assignment of Errors discloses that the sole ground for appeal is the alleged invalidity of the provision in the Pennsylvania Corporate Loans Tax Act exempting securities held by mutual savings banks without capital stock, as modified by the proviso that securities containing tax-free covenants are subject to the said tax. As long ago as 1914 the Supreme Court of Pennsylvania has construed the said proviso as being "intended to preserve the tax on corporate securities owned or held by savings institutions which had no capital stock, where in and by the securities themselves the institutions were already relieved, and needed no legislative exemption": *Commonwealth* v. *Lehigh Valley Railroad Company*, 244 Pa. 241, 90 A. 564 (1914). This construction of the proviso was concurred in by the Supreme Court of Pennsylvania as recently as 1942 in *Commonwealth* v. *School District of Pittsburgh*, 343 Pa. 394, 23 A. (2d) 496 (1942). Under such interpretation of the tax statute by the Supreme Court of Pennsylvania, no substantial Federal question can be raised.

2. Since the said proviso merely limits the exemption and is inextricably integrated with it, it could not be unconstitutional unless the exemption were unconstitutional. Even if the exemption were unconstitutional, the Appellant herein would have to pay the tax on the securities involved in the present case. Therefore, the Appellant cannot be injured by the decision of the Supreme Court of Pennsylvania applying the tax to its securities: *Hermann Estate*, 349 Pa. 230, 36 A. (2d) 804 (1944).

3. It has been the policy of the Pennsylvania Legislature to exempt from taxation bonds held by savings institutions having no capital stock. When the corporation which issues such bonds undertakes to assume the payment of all taxes, the reason for the exemption disappears and the tax is

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ultimately paid by the corporation. This does not result in multiple classification. On the contrary, it preserves in the only manner possible the exemption in favor of savings institutions having no capital stock. If the exemption were to so overlap that it extended to the corporations which had assumed the payment of taxes when the bonds were issued, as Appellant contends it should, discrimination would exist against any such corporation which did not happen to have any bonds held by such savings institutions.

For the foregoing reasons, none of the questions raised on this appeal are of substance.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
By GEORGE W. KEITEL,
Deputy Attorney General,
Of Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 646

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

Appeal from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Commonwealth* v. *New York, Chicago and St. Louis Railroad Company*, No. 14, May Term, 1946 (354 Pa. 388, 47 A. (2d) 272).

MOTION TO DISMISS OR AFFIRM

Now comes the Appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this Court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are

so unsubstantial as not to need further argument. In support of this motion the Appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

COMMONWEALTH OF PENNSYLVANIA,
By GEORGE W. KEITEL,
Deputy Attorney General,
JAMES H. DUFF,
Attorney General.

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Nos. 645 and 646. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* PENNSYLVANIA. Appeals from the Supreme Court of Pennsylvania. November 18, 1946. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Robert M. Fisher* and *John Y. Scott* for appellant. *George W. Keitel,* Deputy Attorney General of Pennsylvania, for appellee. Reported below: 354 Pa. 388, 47 A. 2d 272.

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